Supreme Court, U.S.
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United States

October Term, 1993

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SUPREME COURT, U.S.

DENNIS MARK, *et al.*,
Cross-Petitioners,

vs.

MICHELLE CORWIN, *et al.*,
Cross-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED:

Did *Renne* v. *Geary* 501 US 312 significantly increase plaintiffs' burden to prove justiciability or redressability, or significantly reduce listener standing? If so, how?

Specifically:

(a) To challenge a censorship law, must plaintiffs show that the relief sought would "completely" redress the injury, and that there are no other laws that could possibly be used to cause the same injury?

(b) Do readers have standing to challenge election laws specifically authorizing censorship of statements in voter pamphlets, if the laws have been used to delete information, comments and opinions on many recent occasions?

(c) Do speakers present a justiciable controversy in challenging laws authorizing censorship of voter pamphlet statements if no proceeding against them under those laws was pending when they filed their suit but such proceedings were initiated while it was pending in the district court?

(The first of these is directly related to the first Question proposed by Cross-respondents in their petition for *cert.*

(The others involve other applications of *Renne* in the same *en banc* decision.

(Cross-petitioners support grant of *cert.* on petitioners' first Question if, but only if, in combination with the above.

(Cross-petitioners oppose granting *cert.* on petitioners' second and third Questions.)

LIST OF ALL PARTIES:

This case is the consolidation of related cases *Geary et al. v. Renne et al.* and *Mark et al. v. Corwin et al.*

Cross-petitioners Dennis Mark, Bob Geary, Robert Silvestri, Max Woods, Alexa Smith, Terence Faulkner, Melissa Gundrun, Wayne Johnson, David Soule, Peter Johnson, Robert Gebert and Sudi Trippet are residents and registered voters of the City and County of San Francisco.

Cross-petitioner Election Action is an association of San Francisco residents and voters.

Cross-respondents: Michelle Corwin was San Francisco Registrar of Voters when *Mark v. Corwin* was filed; Jay Patterson was San Francisco Registrar of Voters when *Geary v. Renne* was filed; Louise Renne is San Francisco City Attorney; Dianne Feinstein was Mayor of San Francisco when *Geary v. Renne* was filed.

Cross-respondent San Francisco Board of Supervisors is the governing body of the City and County of San Francisco.

Cross-respondent City and County of San Francisco is a municipal corporation and a political subdivision of the State of California, responsible for conducting federal, state and local elections within its jurisdiction.

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TABLE OF AUTHORITIES:

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Democratic Comm. v. Eu (1987: 9th) 826 F2d 814: 7
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Geary v. Renne I (1990: 9th) 914 F2d 1249: 1
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Kleindienst v. Mandel (1972) 408 US 753: 7
Lamont v. Postmaster Genl. (1965) 381 US 301: 7
Matthews v. Diaz (1976) 426 US 67: 11
Patterson v. Bd. of Sups. (1988) 202 Cal App 3d 22: 9
Poe v. Ullman (1961) 367 US 497: 8
Renne v. Geary (1991) 501 US 312, 111 SCt 2331: *passim*.
SEIU v. FPPC (1992: 9th) 955 F2d 1312: 7
Va. Pharm. Bd. v. Va. Cons. Cl. (1976) 425 US 748: 7

California State Constitution §6(b): *passim*.

California Elections Code §§ 3795, 5025: *passim*.
California Elections Code §§ 10012, 10013.5: *passim*.

CROSS-PETITION FOR WRIT OF *CERT.*:

Cross-petitioners Dennis Mark *et al.* respectfully pray that a writ of *certiorari* be issued to review the judgment and opinion of the U. S. Court of Appeals for the Ninth Circuit, *en banc*, entered in the above-entitled proceeding.

OPINIONS BELOW:

The opinion of the District Court is unreported and is reprinted as City's Appendix D.* The initial decision of a panel of the Court of Appeals is reported as *Geary v. Renne* (9th Cir. 1990) 914 F2d 1249, and reprinted as City's Appendix B. The order of the Ninth Circuit granting re-hearing *en banc* is reported as *Geary v. Renne* (9th Cir. 1991) 924 F2d 175 and reprinted as City's Appendix C. The decision of the Ninth Circuit sitting *en banc* is reported as *Geary v. Renne* (9th Cir. 1993) 2 F3d 989 and reprinted as City's Appendix A.

JURISDICTION OF THE SUPREME COURT:

The judgment of the Court of Appeals (City's Appendix A) was originally filed September 1, 1993. Both Cross-petitioners and Cross-respondents petitioned for re-hearing and re-hearing *en banc* on or prior to September 15, 1993. Re-hearing and re-hearing *en banc* were denied on December 16, 1993. This Court has jurisdiction to review the judgment by writ of *certiorari* under 28 USC 1254. Cross-petitioners expressly rely upon Rule 12.3 of the rules of this Court in filing this cross-petition. Cross-petitioners received the petition for *cert.* filed by cross-respondents on March 18, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Relevant parts of California Elections Code §10012 are reprinted at p 2 of Cross-respondents' petition for *cert.* Relevant parts of California Elections Code §10013.5 are reprinted at p 3 of Cross-respondents' petition for *cert.* The First Amendment is reprinted at p 4 of Cross-respondents' petition for *cert.*

---

* All references to "City's Appendix" refer to the appendix printed with cross-respondents' petition for *cert.* filed about March 18, 1994.

California Elections Code §3795 reads in relevant part:

> ....During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the clerk...may seek a writ of mandate or an injunction requiring any or all such materials to be amended or deleted.
>
> A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof that the material in question is false, misleading or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials...

California Elections Code §5025 reads in relevant part:

> During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the clerk...may seek a writ of mandate or an injunction requiring any or all of the material to be amended or deleted.
>
> A peremptory writ of mandate or an injunction shall be issued only upon clear and convincing proof that the material in question is false, misleading or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials....

STATEMENT OF THE CASE:

On September 11, 1987, Cross-petitioners Bob Geary, Robert Silvestri, Dennis Mark, Melissa Gundrun, Wayne Johnson, David Soule, Peter Johnson, Robert Gebert, Election Action, Terence Faulkner and Sudi Trippet filed suit against Cross-respondents Louise Renne, Jay Patterson, Board of Supervisors, Dianne Feinstein and City and County of San Francisco, in the Northern District of California, pursuant to 42 USC 1983. This action will be referred to hereafter as the *Geary* action.

The complaint in *Geary* contained three causes of action, one of which was before this Court in *Renne v. Geary* (1991) 501 US 312. Only the First Cause of Action is pertinent here. In said cause of action Cross-petitioners sought declaratory and injunctive relief against enforcement by

Cross-respondents of California Elections Code §§ 3795 and 5025, which authorize judicial proceedings to censor ballot arguments submitted for publication in the official voter pamphlet distributed to all San Francisco voters. Cross-petitioners' ¶17 specifically claimed that threatened enforcement of said statutes would abridge their rights as voters to read the voter pamphlet in uncensored form, in violation of the First and Fourteenth Amendments. (See *Geary* Complaint, the relevant parts of which are reprinted in the Appendix to this Cross-petition, at 1-A.)

On August 30, 1988, Cross-petitioners Dennis Mark, Robert Silvestri, Bob Geary, Terence Faulkner, Max Woods and Alexa Smith filed a second action in the same district court against Cross-respondents Michelle Corwin, Louise Renne and City and County of San Francisco, pursuant to 42 USC 1983. This action will be referred to hereafter as the *Mark* action.

The *Mark* complaint had two causes of action. The First Cause of Action challenged California Elections Code §10012 authorizing administrative censorship of candidate statements submitted for publication in the voter pamphlet, as inconsistent with the First and Fourteenth Amendments. The Second Cause of Action challenged California Elections Code §10013.5 authorizing judicial censorship of candidate statements submitted for publication in the voter pamphlet as inconsistent with the First and Fourteenth Amendments. Cross-petitioners specifically claimed that the threatened enforcement of said statutes would abridge their right as voters to read the pamphlet in uncensored form. City's Appendix E, pp 5 and 6, ¶¶ 16 and 19.

The District Court considered the two cases related and issued a single consolidated order and judgment on both, granting Cross-petitioners' requests for injunctive and declaratory relief against enforcement of California Elections Code §§ 3795, 5025 and 10013.5 in part and against 10012 in entirety. City's Appendix D.

Both sides appealed, and the *Geary* and *Mark* cases were consolidated by the Ninth Circuit for purposes of appeal. The initial panel decision reversed the district court insofar as it had ruled for Cross-petitioners on the merits. City's Appendix B. Cross-petitioners then sought rehearing *en banc* by the Ninth Circuit, which was granted on January 30, 1991. City's Appendix C.

Upon rehearing the consolidated cases *en banc* the Ninth Circuit disposed of Cross-petitioners' claims concerning California Elections Code §§ 3795, 5028 and 10013.5 in a single sentence which simply ordered said claims "remanded with instructions to dismiss without prejudice for lack of a justiciable controversy." City's Appendix A p 3. No further reasons were given save a citation to this Court's decision in *Renne v. Geary* 501 US 312.

REASONS FOR GRANTING THE WRIT:

The Petition for *Cert.* begins its first Question by asking: **"Whether the Ninth Circuit *en banc* court violated principles of federal jurisdiction laid down by this Court in the related case of *Renne v. Geary*..."**

Were any "principles of federal jurisdiction" laid down in *Renne*? If so, the *en banc* court seems mystified; see the parts of the hearing transcribed in City's Appendix, and the part attached to this Cross-petition, at 8,9-A, where one judge says that in the *Renne* opinion, the Supreme Court **"made noises which I find difficult to decipher..."**

Renne exemplifies the confusion that can result when a court rules on an unlitigated issue. Cross-respondents hope *Renne* turns out to be a major precedent making it harder to challenge censorship with federal lawsuits; they hope it will help shield them from litigation on the merits as to constitutional complaints. The dissenters in *Renne* also viewed it as a radical break from precedent, though they aren't so eager for the change. But the *Renne* majority in no way seemed to think it was making a major break from the past. Such a change ought not be made without clarity. And, if no big change was really meant, that <u>also</u> needs clarification.

DID *RENNE* CHANGE JUSTICIABILITY PRINCIPLES?

If this Court doesn't speak for itself on this issue, others will speak for it. At City's Appendix I-24 we can see how Petitioners would like to do this:

> **Judge Rymer, you said you had trouble understanding what the Supreme Court case in *Renne* v. *Geary* was saying. Frankly, I think there are two messages. One message is: *"Every doubt is resolved against justiciability."* If you look at the language that the Court uses, they say, *"There is reason to doubt...."***

> ...the second message is, in a forum case like this, in a voter pamphlet case like this, they want a speaker. They don't want listeners, they want a speaker.

Cross-petitioners would prefer to construe *Renne* as based on its unusual facts, not as an announcement of new rules. In *Renne* there was unusually little evidence that the law in dispute (§6(b) of the California constitution) was causing or likely to cause any would-be listener to miss any information. *Renne* may be something of a new precedent in requiring would-be listeners to show more than a speculative peril of blocked communication. But *Renne* only brings in doubt whether listener-standing exists when there is little or no evidence of the existence of any speaker who is blocked from communicating. The present case, though related to *Renne*, involves the opposite situation; the laws challenged here are routinely used to delete parts of ballot-argument and candidate statements from voter pamphlets.

Renne held that that issue wasn't yet "ripe" - *i.e.*, it was <u>*too soon*</u> to judge §6(b) until it was more than a hypothetical problem. Censorship laws which have long been on the books and been used on innumerable occasions, as here, are the opposite case from an endorsement ban with no enforcement mechanism and not even one solid example of blocked communication firmly attributable to it.

It is somewhat dangerous to say that censorship laws are okay as long as they're ineffective. When they *are* effective, will we *know*? And where is the line to be drawn, if not at "zero tolerance"? But the Supreme Court's willingness to put up with supposedly-harmless bans on political parties voicing opinions on issues of concern to them such as non-partisan elections, cannot in all fairness be taken as willingness to also permit such bans when they result in someone actually deleting words from someone else's speech.

The obvious problem with a case-by-case determination whether those who complain of censorship have standing to do so, is that fewer cases will be decided on the merits, and instead of being decided on principles such as whether people have the right to make their own decisions as to which propaganda is "false" or "misleading", they get decided based on collateral matters like whether members of a party county-committee have standing to complain that the committee is barred from endorsing candidates. If the Court did not intend this result, it should make itself more clear.

A: TO CHALLENGE A CENSORSHIP LAW, MUST PLAINTIFFS SHOW THE RELIEF WOULD "COMPLETELY" REDRESS THE INJURY, AND THAT NO OTHER LAW EXISTS THAT COULD BE USED TO THE SAME EFFECT?

A central feature of the present case is the theory that the existence of unchallenged, overlapping laws means that the partial remedy of voiding only some of them would be less-than-complete redress and therefore no redress at all. This is so counter-intuitive that it would probably not be argued were it not for *Renne*'s apparent holding to that effect. According to the Petition for *Cert.* p 13, the *Renne* Court found the injury due to §6(b) to be non-redressable: "[b]ecause the complaint sought such incomplete relief..." To encourage us to seek more complete relief, at p 16-17 they give a survey of the laws we are to challenge, some of which we might well have neglected; they make a point at fn 16 to report that the state supreme court has upheld use of Code of Civil Procedure §1060, the generic declaratory judgment statute, to the same effect.

But does anyone really believe it would have been better if we had included §1060 in our challenge? The only reason given (other than *Renne*'s authority) is to assure that federal courts not consider challenges to state laws except when necessary (*id.*, p 13). But the effect of this rule is to pressure plaintiffs to overplead and challenge laws unnecessarily, so it hardly serves its own stated purpose.

Cross-petitioners hope the Court will take this chance to explain that it only held overlapping laws *sometimes* defeat redressability, not that they *generally* do. Petitioners want the Court to go the opposite direction (*id.*, emph. added):

> A complainant lacks standing when "[t]here is reason to <u>*doubt*</u>" that the relief requested will redress the injury alleged in the complaint. *Renne v. Geary*, 111 SCt at 2337-2338....
>
> In this case, the same situation exists as in *Renne*. The complainants have failed to meet their burden of showing that the relief sought, even if granted, would <u>*completely*</u> redress the injury alleged.

The Court's silence may be taken as an implicit admission that this is the new rule. But the Court never said that an injury is nonredressable <u>*whenever*</u> there are any doubts that the remedy will be effective or <u>*whenever*</u> it would be less-than-complete redress. The Court should make this clear.

(B) DO READERS HAVE STANDING TO CHALLENGE ELECTION LAWS SPECIFICALLY AUTHORIZING CENSORSHIP OF VOTER PAMPHLET STATEMENTS IF THE LAWS HAVE BEEN USED ON NUMEROUS OCCASIONS?

Prior to the decision of this Court in *Renne v. Geary, supra*, there was no question but that would-be listeners or readers of speech and press have standing to challenge restrictions that may lead to censorship or suppression of the speech *even in the absence of an actual would-be speaker* as a co-plaintiff. See *Virginia Pharmacy Board v. Virginia Consumer Council* (1976) 425 US 748, 757 (action by consumers of prescription drugs to challenge ban on advertising of prescription drug prices held to be justiciable despite absence of pharmacist as party); *Kleindienst v. Mandel* (1972) 408 US 753, 759-60, 762-4 (as would-be listeners to his speeches, university professors had standing to challenge exclusion of socialist professor from U.S. on account of his "subversive" views); *Lamont v. Postmaster General* (1965) 381 US 301 (would-be recipients of publications from Communist countries had standing to challenge law permitting postal authorities to refrain from delivering "communist propaganda" unless would-be recipient requested delivery in writing); *Democratic Committee v. Eu* (9th Cir. 1987) 826 F2d 814, 824 (individual party members had standing to challenge endorsement ban "as an infringement of their First Amendment right to listen.")

There was also no question that election laws abridging First Amendment rights could be challenged despite total absence of any past record of enforcement, because of the inherently chilling effect of such laws on protected speech. See *Buckley v. Valeo* (1976) 424 US 1 (plaintiffs allowed to challenge election laws that had not yet taken effect); *Eu v. Democratic Committee* (1989) 489 US 214 (challenged laws had been on books for over 20 years but never enforced); *SEIU v. FPPC* (9th Cir. 1992) 955 F2d 1312 (new laws challenged before they could be enforced against anyone); see also *Epperson v. Arkansas* (1968) 393 US 97, 101-2 (justiciable controversy found to exist in challenge to anti-evolution statute that had been on books for 40 years but never enforced). These First Amendment cases are in clear contrast to many cases, like the contraceptives ban in *Poe v. Ullman* (1961) 367 US 497, involving unenforced laws which lacked chilling effect on protected speech.

In *Babbitt v. Farm Workers* (1979) 442 US 289, 300 fn 12, this Court recognized that an especially liberal standard of justiciability should exist with respect to challenges to election laws (emphasis added):

> Challengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment....Justiciability in such cases depends not so much on the fact of past injury *but on the prospect of its occurrence in an impending or future election*....There is a value in adjudicating election challenges notwithstanding the lapse of a particular election because "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held."...

The decision of this Court in *Renne* has sowed doubt in the lower courts as to whether the foregoing principles are still generally applicable.

Did *Renne* hold merely that a remote and speculative peril of redressable loss of information is insufficient to show listener standing?

Or was *Renne* intended to upend constitutional jurisprudence and overrule numerous past decisions of this court, *sub silento?*

In the instant case, voters claiming the right to read an uncensored voter pamphlet challenged statutes authorizing judicial censorship of ballot-argument and candidate statements under §§ 3795, 5025 and 10013.5. Neither the District Court nor the three-judge panel doubted justiciability, but the *en banc* court dismissed these challenges for lack of a justiciable controversy, giving no explanation beyond a citation to this Court's *Renne* decision.

The *en banc* court apparently ignored these distinctions:

(1) *Renne* dealt with §6(b), a state constitutional clause which had only recently been enacted, and had no apparent enforcement mechanism and no history or imminent future of being used to prevent any speech which couldn't in any case be prevented by other means. By contrast, the three

censorship statutes contain clear enforcement mechanisms which have been used to censor statements on numerous occasions; see Appendix, *Geary* Complaint p 3-A, *En banc* transcript p 10-A, City's Appendix E p 6-7, ¶¶ 20-22.

Ripeness is far more clear here than in *Babbitt v Farm Workers* (1979) 442 US 289, 302, where this Court held that a suit by a labor organization to challenge a state law allowing an administrative agency to issue "cease and desist" orders and courts to issue injunctions against certain forms of "dishonest, untruthful or deceptive" publicity concerning labor disputes, was justiciable although the statute had *never* actually been violated or enforced:

> **We think that the prospect of issuance of an administrative cease-and-desist order...or a court-ordered injunction...against such prohibited conduct provides substantial...support for the conclusion that appellees' challenge to the publicity provision is justiciable.** *(id.)*

Since the *en banc* ruling was unexplained, we can only suppose that the finding of lack of a justiciable controversy included a rejection of listener standing; no other possible ground would be expressed by citation to *Renne*.

The Court should grant *cert.* to clarify whether *Renne* intended to deny listener standing only where based on a mere speculative peril of censorship, or even in cases where censorship has occurred many times, as here.

(2) §6(b) has yet to be subject of a reported case in the state court system; therefore it may be premature to say how it will be construed. But the state courts have had ample opportunity to construe §§ 3795, 5025 and 10013.5. After having had ten years to review the matter, the state courts have given such a sweeping interpretation to §§ 3795 and 5025 that even the initial panel decision of the Ninth Circuit questioned the constitutionality of such construction. See *Patterson v. Bd. of Supervisors* (1988) 202 CA3d 22, 29, holding that these statutes authorize deletion of any material in a ballot argument "not clearly germane to [the] ballot proposition", which the *en banc* court found so overbroad it felt obliged to construe the state appeals court to mean "clearly *not* germane". City's Appendix B p 12 fn 1.

As for § 10013.5, there were two published cases but no longer are any, because the California Supreme Court has twice granted review to appellate decisions construing the

statute, then dismissed the cases and de-published them; see actions of California Supreme Court depublishing *Callignan v. Superior Court* and *Drexel v. Mann*.

(3) In *Renne*, this Court found a redressability problem because invalidating §6(b)'s ban on parties endorsing candidates in non-partisan elections would leave the city free to delete party endorsements from candidate statements under authority of §10012's subject-matter controls (which might be valid even if §6(b) isn't).

Here, no similar problem exists. Cross-petitioners know of no other provision of law but §§ 3795, 5025 and 10013.5 that can be utilized to censor ballot-argument or candidate statements to delete material which has been officially found to be "not clearly germane", "clearly not germane", "false", "misleading" or otherwise officially disfavored.

(C) DO SPEAKERS PRESENT A JUSTICIABLE CONTROVERSY IN CHALLENGING CENSORSHIP LAWS IF A PROCEEDING UNDER THOSE LAWS WAS FILED AGAINST THEM SOON AFTER THEY FILED SUIT?

The *en banc* court's unexplained finding of non-justiciability must also have included rejection of would-be-speaker standing for Cross-petitioners Trippet and Election Action. This apparently would have been based on the city's theory that these speakers lacked standing since there was not a censorship proceeding in process against them when the federal complaint was filed, although such a proceeding did occur seven months later, while the case was pending in the District Court. See 10-A, *infra*, Clerk's Record 42, 44, 124; Appellee's E.R. 141; Motion for Judicial Notice (filed with 9th Circuit on 7/2/1993). The *en banc* citation of *Renne* implies that the court construed it to deny ripeness to speakers until censorship is pending or impending.

In the District Court no issue was raised of justiciability as to plaintiffs who did not have censorship attempts pending when the complaint was filed, since the pre-*Renne* understanding had been that would-be speakers could complain of censorship statutes without waiting for their first adverse encounter.

Speakers should not have to experience their first censorship or attempted censorship, or have such an attempt pending or imminent, before being able to call on the federal courts for protection from a perceived chilling effect.

Renne did not involve would-be speakers (since the committee-members were not found to have standing to litigate the committee's rights) but the *en banc* court has apparently construed *Renne* to deny standing to speaker as well as listener, absent pending or imminent censorship.

But even if these speakers lacked standing when they filed their complaint in September 1987, they certainly had it by April 1988 when their ballot-argument statements were subjected to censorship proceedings; had anyone seen any need for it, a supplemental pleading could and would have been filed while the case was pending.

But the *en banc* court apparently accepted the city's highly formalistic argument that these Cross-petitioners had to have standing including a ripe controversy when the suit was filed, and that later events giving them standing cannot be considered or even brought to the court's attention by supplemental complaint.

That view conflicts with *Matthews v. Diaz* (1976) 426 US 67, 76, fn 5 (emphasis added, footnotes deleted):

> We have little difficulty with Espinosa's failure to file an application with the Secretary until *after* he was joined in the action. Although...filing of an application [is] a nonwaivable condition of jurisdiction..., Espinosa satisfied this condition *while the case was pending in the District Court.*
>
> *A supplemental complaint in the District Court would have eliminated this jurisdictional issue;* since the record discloses, both by affidavit and stipulation, that the jurisdictional condition wa satisfied, *it is not too late, even now, to supplement the complaint to allege this fact.* Under the circumstances, we treat the pleadings as supplemented by the Secretary's stipulation that Espinosa had filed an application.
>
> ....
>
> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 USC §1653....*Although the defect in Espinosa's allegation must be cured by supplemental pleading, instead of amended pleading, the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case....*

Since "the record discloses" that Trippet and Election Action *did* have statements subjected to censorship proceed-

ings under authority of §§ 3795 and 5025 during the course of this litigation, the Ninth Circuit was duty-bound to "treat the pleadings as supplemented by" the judicially noticeable materials it was asked to judicially notice by these Cross-petitioners, and to dispose of their claims on the merits.

Cert. should be granted to clarify whether *Renne* is to be understood to deny standing to would-be-speakers unless they can show pending or impending censorship; and if so, whether they may still make that showing by supplemental pleading if censorship proceedings are initiated against them while the complaint is pending.

CONCLUSION:

Renne was seen by its dissenters as a radical change in justiciability standards, and the majority failed to dispel that impression.

Cert. should be granted to allow the Court to clarify how much *Renne* changed, if anything.

Is redressability found inadequate merely because less-than-complete? Do plaintiffs have to show that there aren't any other laws that can be used to cause the same injury as the challenged law?

Does *Renne* deny listener standing only when censorship is a remote and speculative peril, or also when censorship has occurred on numerous recent occasions?

Does *Renne* deny speakers standing unless censorship is pending or impending at the time of their complaint? If so, can they use supplemental pleading to inform the court that they now have standing?

To answer these, the Court should grant *Cert.* on the combination of the above questions and the first Question proposed by Cross-respondents' petition for *cert.*

Respectfully submitted, April 17, 1994.

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in pro. per.

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UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

BOB GEARY, ROBERT SILVESTRI, DENNIS MARK, MELISSA GUNDRUN, WAYNE JOHNSON, DAVID SOULE, MAX WOODS, PETER JOHNSON, ROBERT GEBERT, ELECTION ACTION, TERENCE FAULKNER and SUDI TRIPPET,

Plaintiffs,

vs.

LOUISE RENNE, San Francisco City Attorny; DIANNE FEINSTEIN, San Francisco Mayor; BOARD OF SUPERVISORS, City and County of San Francisco; CITY AND COUNTY OF SAN FRANCISCO; and JAY PATTERSON, San Francisco Registrar of Voters,

Defendants.

No. C87-4724

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FOR VIOLATION OF CIVIL RIGHTS

GENERAL ALLEGATIONS:

1. Plaintiffs BOB GEARY, ROBERT SILVESTRI, DENNIS MARK, MELISSA GUNDRUN, WAYNE JOHNSON, DAVID SOULE, MAX WOODS, PETER JOHNSON, ROBERT GEBERT, and TERENCE FAULKNER are residents and registered voters of the City and County of San Francisco (hereafter "City and County").

2. Defendant DIANNA FEINSTEIN is Mayor of the City and County and is sued herein in her official capacity.

3. Defendant LOUISE RENNE is City Attorney of the City and County and is sued herein in her official capacity. As City Attorney Ms. Renne is responsible for representing other officials of the City and County in actions commenced by them.

4. Defendant PATTERSON is Registrar of Voters of the City and County and is sued herein in his official capacity. As Registrar of Voters Patterson is responsible for conducting elections in the City and County, publishing voter information pamphlets issued on behalf of the City and County, and enforcing election laws of the State of California and the City and County of San Francisco.

5. Defendant CITY AND COUNTY OF SAN FRANCISCO is a municipal corporation of the State of California.

6. Defendant BOARD OF SUPERVISORS is the legislative body of the City and County and is sued herein in its official capacity.

7. Plaintiff ELECTION ACTION is an organization dedicated to placing measures on the ballot by initiative, and campaigning for and against ballot propositions.

8. Plaintiff SUDI TRIPPET is coordinator of ELECTION ACTION.

9. In doing all acts alleged herein, defendants have been, or threaten to be, acting under color of state law.

10. In connection with each election, the City and County mails a voters pamphlet to all registered voters. Said pamphlet contains ballot arguments for and against City and County measures, and statements of qualifications of candidates for City and County offices. Defendant Patterson is responsible for preparing said voters pamphlet.

FIRST CAUSE OF ACTION

11. Plaintiffs incorporate by reference each and every allegation of paragraphs 1 through 10.

12. In connection with the June 2, 1987 special municipal election plaintiffs GEARY, SILVESTRI and FAULKNER submitted a number of ballot arguments to defendant PATTERSON for publication in the voters pamphlet. Said arguments were accepted for filing by PATTERSON.

13. In connection with the November 3, 1987 general municipal election, plaintiffs GEARY, FAULKNER, WOODS, SILVESTRI and MARK submitted ballot arguments to defendant PATTERSON for publication in the voters pamphlet. Said arguments were accepted for filing by PATTERSON.

14. Defendants PATTERSON, RENNE and CITY AND COUNTY OF SAN FRANCISCO have claimed and now do claim the right to censor the voters pamphlet pursuant to certain California statutes and city ordinances, including but not limited to Elections Code §§ 3795 and 5025. Pursuant to said state and local laws, said defendants have claimed that they are entitled to obtain injunctions from the California Superior Court to restrain publication of ballot arguments or portions thereof, and writs of mandate having such injunctive effect, to prevent publication of ballot arguments or portions thereeof which contain material considered to be "false", "misleading" or "inconsistent" with Chapters 2 and 3 of Division 7 of the Elections Code.

15. Pursuant to the aforementioned California Elections Code Sections, and other state and local laws, defendants RENNE and PATTERSON have filed actions in the California Superior Court and obtained writs of mandate restraining publication of portions of ballot arguments submitted by plaintiffs GEARY, SILVESTRI, FAULKNER, WOODS and MARK in connection with the June 2, 1987 and November 3, 1987 [elections].

16. Unless restrained by order of this court from doing so, RENNE and PATTERSON threaten to commence further actions in connection with future elections to restrain publication of all or portions of ballot arguments submitted by some or all of plaintiffs.

17. Plaintiffs and each of them have been injured by the conduct of RENNE and PATTERSON in commencing the action described in paragraphs 14 and 15, as registered voters who desire to read ballot arguments in their uncensored form. Plaintiffs and each of them will be injured by the conduct of RENNE and PATTERSON in threatening to commence future actions as alleged in paragraph 16, as reg-

istered voters who desire to read ballot arguments in their uncensored form.

18. An actual controversy now exists in that:

a. Plaintiffs contend that California Elections Code §§ [3795] and 5025 are violative of plaintiff's rights to freedom of speech and freedom of the press under the First and Fourteenth Amendments to the United States Constitution, and 42 USC 1983 and 1985 in that said statutes permit imposition of prior restraints on free expression, permit restraint of constitutionally protected statements of opinion and fact concerning elected officials and public issues, and impose unconstitutionally vague and overbroad standards for expression in a forum opened by the City and County.

b. Defendants allege that RENNE, PATTERSON and CITY AND COUNTY OF SAN FRANCISCO dispute said contentions.

19. Because of the past and threatened conduct of defendants RENNE, PATTERSON and CITY AND COUNTY OF SAN FRANCISCO in seeking court orders in the California Superior Court pursuant to said Election Code §§ [3795] and 5025 of ballot arguments submitted by plaintiffs and others, plaintiffs have suffered and will suffer great and irreparable injury, in that they will be denied their constitutional and civil rights of free speech and free press, and will be subjected to a multiplicity of suits, so that plaintiffs cannot fairly be compensated in damages, and are without any adequate remedy at law. . . .

WHEREFORE, plaintiffs pray for judgment:

1. For a judicial declaration that California Elections Code §§ 3795 and 5025 are unconstitutional and violative of the First and Fourteenth Amendments to the United States Constitution and 42 USC 1983 and 1985. . . .

4. For a temporary restraining order, preliminary injunction and permanent injunction to restrain RENNE, CITY AND COUNTY OF SAN FRANCISCO and PATTERSON from commencing or prosecuting any actions brought pursuant to Elections Code §§ 3795 and 5025. . . .

8. For costs, including reasonable attorney fees.

DATED: 9/8/1987 Arlo Hale Smith, Atty. for Plaintiffs

Terence Faulkner, in pro. per. Sudi Trippet, in pro. per.

EN BANC 6/24/1993 HEARING TRANSCRIPT (EXCERPTS)

. . . .

SMITH: ....Briefly, on the whole justiciability argument, I have two problems with what [Mr. Aftergut] said. As I understand it, the prayer for relief is of great significance only in a default case, which this was not. What happened was, both parties briefed the matter and Judge Zirpoli decided the matter on summary judgment, as if the substantive validity of 10012 was an issue, in terms of references to partisan affiliations and identifications in the voters handbook. However, Judge Zirpoli only reached the method used, i.e., administrative censorship.

And I believe there is no doubt that a party could challenge the administrative censorship as a practice, even if these was an alternative judicial remedy that was, in a certain sense, in doubt. For example, the whole Freedman line of cases, with respect to obscenity, there are remedies such as criminal prosecutions or perhaps even injunctive relief the government could follow. But you can't set up administrative censorship unless they go through certain procedures, which of course would include the government having the burden to go forth and get an injunction first. So I don't see how these could be a justiciability problem with respect to that part of the case, both in view of what Judge Zirpoli did and in view of the state of the record.

The panel claimed that 10012 is enforceable under 10013.5, what's being said now. But clearly the record shows that was not the practice in San Francisco at the time the suit was filed. In fact, there was some 6 years worth of administrative censorship before it finally stopped after the Mark v. Corwin suit was commenced.

COURT: Do you agree that the intent in filing Mark v. Corwin was to reach the administrative censorship issue, and not the substantive validity of 10012?

SMITH: I thought we'd never get to the substantive validity. But frankly, what happened was when they made the summary judgment motion...they defended it on the merits. It was shortly after there'd been a panel decision in the other part of this case, Geary v Renne, upholding the endorsement ban. So they were strongly urging the substantive validity. So I responded on that point. Judge Zirpoli however ended up not even getting to that, because

he said, "I don't have to get to that. There's a problem of use of administrative censorship."

COURT: So we don't have to get to it either, because we don't have a district court decision on the substantive merits of 10012?

SMITH: No, indeed. I only reached the substantive merits because they briefed it and because they were saying that, with respect to the fall-back argument, if the administrative censorship is upheld, then I'm arguing the whole thing is invalid. If this court decided that the administrative censorship was unconstitutional, then you probably wouldn't have to reach it, at this point.

COURT: That would take care of these claims, as you see them, under the record that's brought to us? That is, if we held that administrative censorship under 10012 was properly stricken by the district court, as you view the record, we would have responded to the issues before us dealing with 10012?

SMITH: Exactly, your honor. Because basically what prompted it was we'd had a number of incidents, the most recent one was Mr. Mark's ballot argument being censored in 1988, where in that case some of the material stricken had nothing to do with party affiliation at all.

COURT: If in fact that's what happens, then the only thing that we're left with for the Marks side of the case is whether or not there's proper enforceability under 10013.5. And the opposition says we never get to that issue because it's moot under Renne, the Supreme Court -

SMITH: I want to make some points about...the Renne standing issue. I think the decision Judge Norris wrote in SEIU v. Fair Political Practices Commission 955 Fed 2d 1312...really helps formulate where you go with Renne... and that is Renne does not establish a general principle that if election law has been previously unenforced or was enforced only once in the past, that it can't be challenged. I think it rests on the very unusual problem of the Supreme Court being unsure just who would enforce and... [whether] the state constitutional provisions there would be enforced. Here, we have a statute to fit. The registrar had the enforcement power. It's just like the FPPC in the

SEIU case; the FPPC had enforcement power. If we've got someone who by statute has enforcement power and they express their intent to enforce, and there has been some enforcement (and the record shows there has been), your guidance has to be in cases such as Buckley....I don't think Geary v Renne really creates a justiciability problem. I think if you look at California's decision in Eu v. Democratic Party, where you had all these statutes...that have never been enforced....yet the parties who would be affected had standing. That case and the Buckley case, where Senator Buckley went out and sued the day after the statute passed and two years before any election would even be applicable....

COURT: Counsel, you're going into quite a few other cases but my question was directed at a single case. I don't think anyone's accused the Supreme Court of being clear on its First Amendment analysis. But we have a case, the reverse of one of our cases, which was part of this whole case. And in that case, the city says (and I think you ought to get your best argument why the city is wrong)... if you focus on that particular part of Judge Kennedy's argument, "While the mootness exception for disputes capable of repetition yet evading review has been applied in the election context....that doctrine will not revive a dispute which became moot before the action commenced". The city tells us how the only time the city has used this was two years before the filing of the suit. There may be a good answer to that. What is the answer to that?....

SMITH: I think the best answer to that is the one that Judges Norris and Poole gave, and which Judge Wiggins who dissented on the merits agreed on that point in the SEIU case, and that is the existence of an enforcement authority that intends to regularly enforce an election statute, would create a continuing controversy. Basically, the city registrar of voters has the enforcement authority to go get censorship orders of the voters pamphlet under 10013.5 candidate statements. They have that authority....

COURT: Could you please tell me who the appellees are in these remaining issues? Who are they? Listeners? Voters?

SMITH: I would say appellees are voters and listeners with two qualifications. Of course, Dennis Mark did submit a

candidate statement that did get administratively censored.

COURT: When was that?

SMITH: In 1988.

COURT: Before or after the lawsuit?

SMITH: It was the reason for the lawsuit. In fact, the lawsuit was brought because it was censored in connection with that election. That was brought in September of that year immediately after this happened. With respect to the remaining parties, Ms. Trippet and Election Action, the record at CR 124 and CR 45 clearly reflects that during the pendancy of this lawsuit in 1988, after the lawsuit was brought but before Judge Zirpoli ruled, a censorship action was brought under 3795 and 5025 against ballot arguments that Ms. Trippet and Election Action submitted....

COURT: But that wasn't under 10013.5. That was under the ballot arguments.

SMITH: I thought that the question wasn't restricted just to the candidate statement part of the case, so I answered it more broadly.

COURT: What appellees are left on issues other than 10012? As I understand it, if we affirm the district court on the unconstitutionality of the administrative censorship under 10012, that goes away. That leaves the other sections relative to false and misleading statements and inconsistent statements. Right?

SMITH: Yes.

COURT: Who's left on those issues?

SMITH: With respect to candidate statements as opposed to ballot arguments, I candidly have to say that everyone is a would-be listener.

COURT: No-one's statements have been stricken? No plaintiff has had a statement stricken under 10013.5? Under the other two, yes, but under that one, no?

COURT: On the ballot argument side, which is Geary, if I understand the state of things correctly it is voters who are asserting the injury. In...Renne, the Supreme Court made noises, which I find difficult to decipher, but they

made noises about the need to have those voters and a candidate statement, when it's just a voters-only injury. What is your view of what the Supreme Court said that is pertinent on that point?

SMITH: My view is that since the Supreme Court did not override Kleindienst v. Mandel, Lamont v. Postmaster General or Virginia Consumers Council, since they did not overrule, the language in the majority opinion was not disapproving them, I believe. I think you have to read it as being...in that particular case a redressability problem... Here you're talking about a statute that expressly says the registrar has the authority to bring suits to delete or amend material in the voters handbook in candidate statements. In [Renne] you have the state constitution imposing an endorsement ban. You didn't have an express provision for the city attorney or the registrar to bring suit, although they claimed they did have the authority to do it. No express enforcement mechanism sitting there.

So I think the court was concerned about, how is this kind of dispute going to arise? With 10013.5, it's really clear how that kind of dispute could arise, because the registrar has that authority to seek injunctions under those statutes. In [Renne] I think the problem was that the lack of such clear enforcement mechanism caused the court to pause and ask, "Well, maybe no one will ever get, maybe this is abstract in the sense that no one will make an endorsement" - -

COURT: Let's make this question a little bit more specific. I think it came up in the context of standing - at least that's what I wanted to hear your comments on - because Geary is now left with only voters expressing an injury. There is no...group out there saying it wants to put in an argument pro or con on a ballot proposition.

SMITH: Yes, there is. Sudi Trippet [and] Election Action submitted ballot arguments, CR 124, CR 42-45.

COURT: Oh, you mean a group - -

SMITH: The group Election Action and Ms. Trippet personally submitted ballot arguments.

COURT: Is this in a declaration or something?

SMITH: The CRs in the 40s is where the city sought

reconsideration of Judge Zirpoli's original ruling in our favor because they wanted to bring a lawsuit under those two statutes to delete material from a number of ballot arguments and they expressly included arguments by Ms. Trippet. CR 124 is basically where we recount what happened in that litigation.

. . . .

COURT: Is this a statement under oath?

SMITH: This was a declaration... And I also refer your honor to CR 124, a much later declaration that explains what happened. And appellees record CR 141.

COURT: What's the bottom line of those declarations?

SMITH: This bottom line is, and this goes back to Judge Rymer's inquiry, that those declarations show that the city filed declarations saying - one was by Michelle Corwin, that's CR 145-147 - "We want to bring a suit. Judge Zirpoli, please reconsider your ruling, for now, because we want to bring a suit to amend a number of ballot arguments". And that included ballot arguments from Ms. Trippet and Election Action. Then the other references are declarations that recount what happened, recount that the City Attorney brought proceedings, and the outcome...In that case, about 1/2 of Ms. Trippet's ballot arguments were allowed and 1/2 weren't.

COURT: That was in connection with the November 1987 election?

SMITH: No, this was June 1988, your honor.

COURT: Can you name a specific incident that is at issue right now out of the 1988 [election]?

SMITH: Yes, Ms. Trippet's ballot arguments.

COURT: And it was rejected or edited?

SMITH: They were heavily edited.

COURT: Are you satisfied with Judge Zirpoli's ruling?

SMITH: No, the part I'm not satisfied with - Judge Zirpoli, I believe, reached a correct ruling on the parts of the statute about "false" and "misleading". But on what I think is the more vague provision, about "inconsistent" material,

he upheld that, and I believe that has greater potential for abuse and unlimited censorship than the other two. Because basically if you went as far as one state court did (in Patterson v. Board of Supervisors, if the standard is you can censor anything [if] it's not clearly relevant to a ballot measure, that is in my view a textbook amorphous non-objective restriction, which the US Supreme Court unanimously agreed in Airport Commission v. Jews for Jesus...that even if it was not a public forum...using a relevancy-based test with no further restriction than just "Is it relevant?", was too vague and ambiguous even in a non-public...And I would cite the court also to...Vanasco v. Schwartz where...the court said "the term 'misrepresentation' could be applied to almost all political speech." In the same decision they talked about vague standards and were concerned about - -

COURT: Just 30 seconds. What is there left of this case that is not moot?

SMITH: I don't think anything is moot. You've got the continuing controversy about whether the registrar can use these statutes to delete material in the voter handbook. This controversy with respect to ballot arguments was so active that, as I showed you before, in 1988, right in the middle of this lawsuit, they went back to district court to get Judge Zirpoli to - -

COURT: So nothing else has happened in the past 5 years?

SMITH: Nothing has happened from the registrar for the past 5 years for a very good reason, your honor. Judge Zirpoli's injunction was in place because this court wouldn't stay it until late 1990.

COURT: Has anything happened since late 1990?

SMITH: There's been private party suits that got to the California Supreme Court. I'm thinking in part of the Drexel case. In San Francisco county, no. And I think it's because of this lawsuit, candidly.

. . . .

COURT:...after we decide on the administrative censorship, it seems to me entirely different from the court proceeding, regardless of the way we decide 10012. We still have to decide, it seems to me, unless it's moot under Renne,

which you say it is not, we have to decide whether the procedures under 10013.5 - going to court and by clear and convincing evidence demonstrate either that its been false or misleading or it's inconsistent because they can, under 10012, indicate their party preference, isn't that issue still alive, or did you jettison that one?

SMITH: I would say that because of Renne it's even more alive than if Renne hadn't been decided, in the sense that under the redressability test, I think they're almost saying that we had to challenge both statutes.

COURT: Is the answer you're still pressing the unconstitutionality of that section before us now?

SMITH: Yes, but I believe if they were to seek a judicial remedy, they couldn't do it under that vague, over-broad statute. They would have to use a regular declaratory relief or regular mandamus procedure.

COURT: Now you've managed, one way or the other, to get me extremely confused. Ten minutes ago you conceded that if we found in the Mark case that the administrative censorship was inappropriate, as Zirpoli found, that we would not, in this case, worry about 10013.5, so far as candidate statements are concerned. However, if I understand the cases correctly, we do have the issue in Renne because you say that the Trippet candidate statement makes it alive, as to whether "false, misleading or inconsistent" is an appropriate constitutional standard for ballot arguments. Did I state that all correctly?

SMITH: Not exactly. You stated correctly the part about Trippet and the ballot argument. But you state incorrectly that I was saying that if you found that administrative censorship was invalid, that you never had to get to 10013.5. That's not correct. What I was saying is you need not reach the merits on candidate statements, specifically the one about partisan preferences...You wouldn't have to reach the merits of that substantively, if you decided it's invalid procedurally.

COURT: Is that because there was never an action brought under 10013.5 in the Mark case. It was done administratively under 10012?.

SMITH: Absolutely, it was all done administratively. It was

done administratively in all the prior examples we cited.

COURT: Then what you're saying is, for Mark - that is, the candidate statement - if we sustain Judge Zirpoli under 10012, then that completes the Mark case?

SMITH: No, it doesn't, because I believe we have listener standing to challenge 10013.5, and we are.

COURT: With that, time allotted is complete.

Supreme Court, U.S.
FILED
JUN 13 1994
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No. 93-1846

In The

Supreme Court of the United States

October Term, 1993

DENNIS MARK, *et al.*,

Cross-Petitioners,

vs.

MICHELLE CORWIN, Registrar of Voters for the CITY AND COUNTY OF SAN FRANCISCO, *et al.*,

Cross-Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION

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QUESTION PRESENTED

Should this Court grant certiorari to "clarify" or "reinterpret" its three-year-old decision in *Renne v. Geary*, 501 U.S. 312 (1991), particularly in a case in which the Court of Appeals correctly applied *Renne* and found non-justiciable the controversy the Cross-Petition seeks to revive?

LIST OF ALL PARTIES

Although the "Questions Presented" in the Cross-Petition do not include any question relating to the case of *Mark v. Corwin*, the Cross-Petition's "List of All Parties" includes parties from that case, as well as from the related case of *Geary v. Renne*. In addition, the body of the Cross-Petition obliquely argues issues from the second claim for relief in *Mark v. Corwin*. Accordingly, even though issues from *Mark v. Corwin* have not been properly presented in the Cross-Petition, for the Court's information, Cross-Respondents Louise H. Renne and the City and County of San Francisco, *et al.* ("San Francisco"), list below the parties from *Mark v. Corwin* as well as those in *Geary v. Renne*.

In *Geary*, Cross-Petitioners Melissa Gudrun, Wayne Johnson, David Soule, Peter Johnson, and Robert Gebert are residents and registered voters of the City and County of San Francisco. (Original complainants Bob Geary, Terence Faulkner, Robert Silvestri, Max Woods and Dennis Mark were dismissed from the action and are not parties to the Cross-Petition.)

Cross-Petitioner Election Action is an organization dedicated to placing measures on the ballot by initiative, and campaigning for and against ballot measures. Cross-Petitioner Sudi Trippet is coordinator of Election Action. The *Geary* complaint does not allege that Trippet is a resident or registered voter of San Francisco, or that Election Action includes any residents or registered voters of San Francisco.

LIST OF ALL PARTIES – Continued

Cross-Respondent Louise H. Renne is the City Attorney for the City and County of San Francisco. Cross-Respondent Jay Patterson is a former Registrar of Voters of the City and County of San Francisco; Cross-Respondent Dianne Feinstein is a former Mayor of San Francisco; Cross-Respondent San Francisco Board of Supervisors is the governing body of the City and County of San Francisco. Cross-Respondent City and County of San Francisco is a municipal corporation and a political subdivision of the State of California. The City and County is responsible for conducting federal, state and local elections within its jurisdiction.

In *Mark*, complainants Dennis Mark, Bob Geary, Robert Silvestri, Max Woods, Alexa Smith and Terence Faulkner are residents and registered voters of the City and County of San Francisco.

Michelle Corwin is a former Registrar of Voters of the City and County of San Francisco. Other Cross-Respondents, identified above, are Louise Renne and the City and County of San Francisco.

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No. 93-1846

In The

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DENNIS MARK, *et al.*,

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Cross-Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION

OPINIONS BELOW

The *en banc* Order of the Court of Appeals for the Ninth Circuit ("the Order") is reported under the name *Geary v. Renne* at 2 F.3d 989 (1993), reprinted in Appendix A to the City and County of San Francisco's Petition for Certiorari in *Corwin v. Mark*, No. 93-1846 ("Petition for Certiorari"), p. A-1.

The initial Ninth Circuit panel's opinion is reported under the name *Geary v. Renne* at 914 F.2d 1249 (1990), reprinted in Appendix B to the Petition for Certiorari, p. B-1. The order granting the petition for rehearing of

Cross-Petitioners and setting a rehearing *en banc* is reported at 924 F.2d 175, reprinted in Appendix C to the Petition for Certiorari, p. C-1.

The order of the United States District Court for the Northern District of California (Zirpoli, D.J.) is unpublished and is reprinted in Appendix D to the Petition for Certiorari, p. D-1.

JURISDICTION

Cross-Petitioners Bob Geary, Sudi Trippet, *et al.* ("Trippet"), brought the action entitled *Geary v. Renne* on September 11, 1987, in the United States District Court for the Northern District of California.[1] The complaint sought relief under 42 U.S.C. §§1983 and 1985.

The *Geary* complaint set forth three claims. Only the first claim is at issue here. It challenged the constitutionality of California Elections Code §§3795 and 5025. The second claim was dismissed by the district court and the dismissal was not appealed. The third claim, also not at issue, challenged Article II, §6(b) of the California Constitution. The third claim reached this Court separately three years ago, when the claim was held nonjusticiable. *Renne v. Geary*, 501 U.S. 312 (1991).

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[1] We refer collectively to the Cross-Petitioners as "Trippet" rather than "Geary" because the district court dismissed Geary (and four of the other original complainants) from this action in 1987. *See* p. 7 *post*.

On August 30, 1988, Cross-Petitioners Dennis Mark, *et al.* ("Mark"), brought a different action, *Mark v. Corwin*, in the Northern District of California, involving related claims. The *Mark* complaint also sought relief under 42 U.S.C. §§1983 and 1985.

Mark's complaint set forth two claims. The first claim, which challenged the application of California Elections Code §10012, is at issue in San Francisco's Petition for Certiorari, but not in this Cross-Petition. The second claim, which Mark may have intended to put at issue here, challenged the constitutionality of California Elections Code §10013.5.[2]

The district court's jurisdiction in both *Geary* and *Mark* was based on 28 U.S.C. §§1331 and 1343. The district court consolidated the cases, and, on April 28, 1989, held unconstitutional all of the challenged Elections Code statutes.

On the City's appeal, the Ninth Circuit had appellate jurisdiction under 28 U.S.C. §1291. A unanimous panel reversed the district court's judgment as to each statute. *See* Appendix B to Petition for Certiorari.

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[2] The "Questions Presented" in the Cross-Petition do not raise any issue relating to the second claim in *Mark*. At the same time, the body of the Cross-Petition intermittently refers to §10013.5, the statute at issue in that claim. Thus, it appears that Mark may have intended to seek this Court's review of the Ninth Circuit's judgment dismissing the second claim for relief in *Mark*. Out of caution, San Francisco includes in this Opposition the reasons why this Court should not grant such review.

Following Trippet's and Mark's successful petition for *en banc* review, and following this Court's decision in *Renne v. Geary*, 501 U.S. 312 (1991), the City requested leave to brief the issue of the justiciability of all of the claims in the two cases.

By letter-brief of May 24, 1993, the City challenged the standing of Trippet and the other complainants who remained in the *Geary* action, since none had submitted ballot arguments for inclusion in the San Francisco Voter's Information Pamphlet ("the voter's pamphlet"). As to the second claim in the *Mark* action, the City pointed out that the controversy was moot, since it arose from a 1986 election and the complaint was not filed until 1988. The *en banc* court's September 1, 1993 Order held that both claims were nonjusticiable. *See* Appx. A to Petition for Certiorari, p. A-1.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. California Elections Code §§3795 and 5025 provide in pertinent part as follows:

> During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the clerk, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the materials [in the voter's pamphlet] to be amended or deleted. A peremptory writ of mandate or an injunction shall be issued only upon

> clear and convincing proof that the material in question is false, misleading or inconsistent with the requirements of this chapter. . . . [3]

2. California Elections Code §10013.5 provides in pertinent part as follows:

> Not less than 10 calendar days before the clerk submits the official voter's pamphlet referred to in Section 10012 for printing, the clerk shall make a copy of the voter's pamphlet available for public examination in the clerk's office. . . .
>
> During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the clerk, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the material in the voter's pamphlet to be amended or deleted. A peremptory writ of mandate or an injunction shall issue only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law. . . .

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[3] California Elections Code §§3795 and 5025 are identical provisions, one applying to cities and the other to counties. Because San Francisco is both a city and a county, both provisions are implicated here. All statutory references are to the California Elections Code.

3. The First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Trippet and 11 other complainants filed the *Geary* action on September 11, 1987. The complaint included three claims for relief, only the first of which is at issue here.

The first claim alleged that in connection with the November 3, 1987 election, five of the 12 complainants – Geary, Faulkner, Silvestri, Woods and Mark – submitted ballot arguments for publication in the voter's pamphlet.[4] Ballot arguments are statements submitted to the Registrar of Voters taking positions for or against legislative measures to be voted upon by the electorate. The voter's pamphlet is an educational tool for voters, published

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[4] The *Geary* complaint also alleged that plaintiffs Geary, Silvestri and Faulkner submitted ballot arguments in connection with the *June 1987* municipal election. *See Geary* complaint, ¶12, reprinted in the Cross-Petition, p. 3-A. This dispute, however, was not live when the action was filed in September 1987, three months *after* the June election had occurred. *See* pp. 16-17 *post*.

before each election by the government and sent to all registered voters in the jurisdiction. *See* §10012(b).

The *Geary* complaint's first claim alleged that pursuant to California Elections Code §§3795 and 5025, San Francisco's Registrar of Voters had gone to state court and obtained orders deleting false and misleading statements in ballot arguments before they were published in the voter's pamphlet. Sections 3795 and 5025 state that before a ballot argument is published in a voter's pamphlet, a registrar (or any voter) may seek a judicial order deleting or amending statements that are false, misleading or inconsistent with the requirements of the California Elections Code. Before the material may be ordered amended or deleted, the registrar must prove to the court by clear and convincing evidence that the statement is factually false, misleading or inconsistent with legal requirements.

On October 27, 1987, the district court dismissed plaintiffs Geary, Faulkner, Silvestri, Woods and Mark because they were parties in an identical state court action, *Patterson v. Board of Supervisors*, 202 Cal.App.3d 22 (1988). The dismissal was not appealed. Thus, the only complainants left in the action were an association, Election Action, and six individuals who, according to the complaint, "desire to read ballot arguments in their uncensored form." *See Geary* complaint, ¶17, reprinted in Cross-Petition, p. 3-A. In other words, none of the remaining complainants had submitted ballot arguments in connection with the November 1987 election.

On April 21, 1988, the district court temporarily abstained from further considering the first claim for relief pending resolution of the *Patterson* case.[5]

On August 30, 1988, almost a year after the complaint in *Geary* was filed, Dennis Mark and five other complainants filed a related action, *Mark v. Corwin*. Mark's first claim for relief is at issue in San Francisco's Petition for Certiorari but is not at issue in the Cross-Petition. Mark's second claim for relief challenged the constitutionality of §10013.5.

The second claim alleged that in connection with the 1986 general election, the City invoked §10013.5 to obtain a court order deleting portions of a candidate's statement submitted for publication in the voter's pamphlet. *Mark* Complaint, ¶20; the *Mark* Complaint is reprinted as Appx. E to the Petition for Certiorari, p. E-1. A candidate's statement is a statutorily authorized, 200-word statement of qualifications by candidates for nonpartisan office.[6] *See* §10012(a). The *Mark* complaint alleged, among other things, that §10013.5 violates the First Amendment because the statute authorizes invalid prior restraints on expression.

Following the California Court of Appeal's decision in *Patterson*, the district court consolidated the first claim in *Geary* with the *Mark* action.

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[5] Because of this temporary abstention as to the first claim, the district court ruled separately on the third claim, which ultimately proceeded on its own to this Court. *Renne v. Geary*, 510 U.S. 312.

[6] County, city, school, and judicial offices in California are nonpartisan. Cal. Const., art. II, §6(a); Cal. Elec. Code §37.

On April 28, 1989, the district court granted Trippet's motion for summary judgment on her first claim in the *Geary* action and Mark's motion for summary judgment on his second claim for relief. *See* Appx. D to Petition for Certiorari, p. D-10. Judge Zirpoli held that §§3795, 5025 and 10013.5 violated the First Amendment because they permitted courts to amend or delete false statements in ballot arguments and candidate's statements without requiring "actual malice" on the part of the authors. *See New York Times v. Sullivan*, 376 U.S. 254 (1964); Appx. D to Petition for Certiorari, p. D-6.

The City filed its notice of appeal on May 2, 1989.

On September 14, 1990, a three-judge panel of the Ninth Circuit issued a unanimous opinion reversing the district court's judgment. *Geary v. Renne*, 914 F.2d 1249; Appx. B to Petition for Certiorari, p. B-16. The court distinguished *Times v. Sullivan* on the grounds that (1) the statutes at issue here do not suppress protected expression because false and misleading statements are not prohibited generally but only in the voter's pamphlet, and (2) the authors do not have a protected interest in publishing false or misleading statements in the pamphlet. *Geary v. Renne*, 914 F.2d at 1254; Appx. B to Petition for Certiorari, p. B-13.

The panel also reversed the district court's grant of summary judgment to the complainants in *Mark*, 914 F.2d at 1251; Appx. B to Petition for Certiorari, p. B-16.

Trippet and Mark petitioned for *en banc* review. On January 30, 1991, the Ninth Circuit granted the petition. 924 F.2d 175; Appx. C to the Petition for Certiorari.

Following a lengthy stay of the appeal pending resolution of two similar cases in the California Supreme Court, in April 1993, San Francisco asked the *en banc* court for permission to brief issues of justiciability in light of *Renne v. Geary*, 501 U.S. 312. The court granted the request.

In its May 24, 1993 letter-brief, the City asserted that Trippet and the other remaining complainants in *Geary* lacked standing to challenge §§3795 and 5025 because none had actually submitted ballot arguments for inclusion in the voter's pamphlet. As to the second claim in *Mark*, the City pointed out that under *Renne*, the controversy was moot because it arose from an election that had occurred nearly two years before the complaint was filed. A copy of the City's May 24, 1993 letter-brief setting forth these arguments is reprinted as Appendix F to the Petition for Certiorari.

On June 24, 1993, at the hearing before the *en banc* court, Trippet argued that she and an organization known as Election Action had submitted ballot arguments in connection with the June 1988 municipal election in San Francisco. Trippet asserted that these arguments were the subject of judicial censoring and therefore that she and Election Action had standing in *Geary*, which was filed in September 1987.

On July 21, 1993, San Francisco filed with the Ninth Circuit a letter responding to this new assertion. The letter pointed out that the ballot arguments submitted by Election Action and Ms. Trippet related to an entirely different election and an entirely different controversy than those alleged in the complaint. The letter also

emphasized that under *Renne*, it was too late to supplement the complaint: "A supplemental complaint *in 1993* alleging that appellees Trippet and Election Action submitted ballot arguments before the June 1988 election would not set forth a live controversy, since a court could not longer grant any relief with respect to that election. *See Renne v. Geary*, [501 U.S. 316, 320-321 (1991).]" A copy of San Francisco's July 21, 1993 letter is reprinted as Appendix A to this Opposition.

On September 1, 1993, the eleven-judge *en banc* court issued its summary Order. 2 F.3d at 990; Appx. A to Petition for Certiorari, p. A-3. With respect to the first claim in *Geary* and the second claim in *Mark*, the court ordered "that the judgments are vacated and the cases are remanded without prejudice for lack of a justiciable controversy. . . . " *Ibid.*

On September 14, 1993, the Cross-Petitioners sought a rehearing. On December 16, 1993, the *en banc* court denied the petition.

On March 15, 1994, San Francisco filed its Petition for Certiorari in *Corwin v. Mark*, No. 93-1550, seeking review of the Ninth Circuit's judgment as to the first claim for relief in that action. On April 18, 1994, Trippet filed this Cross-Petition.

REASONS FOR DENYING THE WRIT

A. The Court Should Not Grant Certiorari To "Clarify" Or "Interpret" A Three-Year-Old Decision Which Speaks Clearly For Itself.

The Cross-Petition in this case asks the Court to grant certiorari in order to "clarify" what the Court meant in *Renne v. Geary*, 501 U.S. 312, a case brought by the same complainants and decided against them a mere three years ago. *See* Cross-Petition, pp. 4, 5, 6, 9 and 12. The Cross-Petitioners do not assert that the Ninth Circuit's decision conflicts with *Renne*. Rather, they appear unhappy with what *Renne* says, and ask the Court now to reinterpret or change it. Thus, for example, the Cross-Petition states:

> The obvious problem with a case-by-case determination whether those who complain about censorship have standing to do so is that fewer cases will be decided on the merits. . . . If the Court did not intend this result, it should make itself more clear.

Cross-Petition, p. 5.

Plainly, this Court does not grant certiorari to issue "clarifications" of recently rendered decisions. The *Renne* opinion speaks for itself. Even more plainly, there is no need for the Court to take its time to restate the obvious principles (1) that standing is necessarily determined on a case-by-case basis, (2) that defective pleadings result in cases not being decided on the merits, or (3) that the rules of justiciability apply to all federal cases, including those alleging improper censorship.

B. The Court Should Not Grant Certiorari Because The Ninth Circuit's Decision As To The First Claim In *Geary* And the Second Claim In *Mark* Is Correct.

Certiorari here is not warranted for another basic reason: The Ninth Circuit correctly decided that both claims at issue here were nonjusticiable.

1. The Remaining Complainants In *Geary* Lack Standing.

As to *Geary*, the Ninth Circuit accepted the City's argument that the remaining complainants lacked standing to challenge §§3795 and 5025. That argument was based on *Renne*. There, wholly apart from doubts about the redressability of the complaint, this Court questioned the right of the complainants to "stand in the shoes" of nonpartisan candidates who wished to have published in the voter's pamphlet the fact that a political party had endorsed them:

> Nor is it clear, putting aside our concerns about redressability, that the committee members have third party standing to assert the rights of candidates, *since no obvious barrier exists that would prevent a candidate from asserting his or her own rights. See Powers v. Ohio*, 499 U.S. 400, 414-415 (1991).

Renne, 501 U.S. at 320 (emphasis added.).

The same reasoning applies here. No obvious barrier exists that would prevent the author of a ballot pamphlet from asserting his or her own rights.

Moreover, there is nothing in the statutes at issue here that deters would-be authors of ballot arguments. Like the challenged provision in *Renne*, and unlike the regulation in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) and other cases cited by Cross-Petitioners, §§3795 and 5025 carry no criminal or civil penalties and may be enforced only through judicial action. As a result, concerns about "chilling" expression are not present here.[7]

Cross-Petitioners Trippet and Election Action argue that even if they lacked standing when they filed the complaint in September 1987, "they certainly had it by April 1988 when their ballot-argument statements were subjected to censorship proceedings." But those facts involve a different election and a different controversy from the one alleged in the complaint. And the law is clear that "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2141 (1992) (emphasis added in *Lujan*), quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989).[8]

In this case, the *Geary* complaint does not set forth facts establishing that Cross-Petitioners Trippet or

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[7] For additional reasons why third party standing is not appropriate here, we refer the Court to the City's May 24, 1993 letter to the Ninth Circuit on justiciability, reprinted as Appendix F to the Petition for Certiorari.

[8] Moreover, if standing does not exist when the complaint is filed, it does not matter if the controversy is of a kind capable of repetition yet evading review. *Nelsen v. King County*, 895 F.2d 1248, 1254 (9th Cir. 1990). That exception is limited to the doctrine of mootness. *Ibid.*

Election Action have standing as "speakers": The complaint does not allege that they ever submitted ballot arguments.

Indeed, the complaint does not even establish that Trippet or Election Action have standing as "listeners": Although the complaint alleges that 10 of the 12 original complainants are San Francisco residents and registered voters, that allegation is conspicuously absent with respect to Trippet. *See Geary* Complaint, ¶¶1 and 8, reprinted in the Cross-Petition, p. 2-A. Nor does the complaint allege that any member of Election Action is a registered voter in San Francisco. *Id.*, ¶7. Thus, the complaint fails even to assert that Trippet and Election Action have been injured "as registered voters who desire to read ballot arguments in their uncensored form," or in any other way. *Id.*, ¶17, Cross-Petition, p. 3-A. The burden of establishing standing is upon the complainants. *Renne*, 501 U.S. at 316.

Moreover, supplementation of the complaint at this point to allege such facts would not be permissible: A supplemented complaint *in 1994* alleging (1) that Trippet was a San Francisco voter; (2) that Election Action included registered San Francisco voters among its members; and (3) that Trippet or Election Action submitted ballot arguments in connection with the *June 1988* election would not set forth a live controversy, since a court could no longer grant any relief with respect to that election. *See Renne v. Geary*, 501 U.S. at 320-321; see pp. 16-17 *post*.

Thus, the supplementation could not be permitted because such a controversy would not be justiciable. *Ibid.*

This fact distinguishes *Matthews v. Diaz*, 426 U.S. 67, 76 (1976), cited by Cross-Petitioners.

2. The Controversy In Mark's Second Claim Is Moot.

The "Questions Presented" in the Cross-Petition do not raise any issue with respect to the second claim in *Mark v. Corwin*. Even if Mark *had* properly presented such a question to the Court, however, it should deny the Cross-Petition because the Ninth Circuit's decision was correct.

In finding Mark's second claim nonjusticiable, the Ninth Circuit plainly determined that the controversy was moot. The complaint alleged that pursuant to §10013.5, San Francisco obtained a court order deleting portions of a single complainant's candidate statement before the *November 1986* general election. But the complaint was filed nearly two years later, in *August 1988*. Thus, under *Renne*, the dispute was not live when Mark filed suit:

> While the mootness exception for disputes capable of repetition yet evading review has been applied in the election context, *see Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), that doctrine will not revive a dispute which became moot before the action commenced. 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.' *O'Shea v. Littleton*, 484 U.S. 488, 495-496 (1974); *see Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Renne v. Geary, 501 U.S. at 320.

There were no "continuing, present adverse effects" in August 1988 from the judicial order to delete portions of a candidate's statement in connection with the long-completed election of November 1986. Thus, the Ninth Circuit correctly determined that the controversy alleged in Mark's second claim was not justiciable.

CONCLUSION

This case is not worthy of this Court's attention for at least two reasons.

First, the Court does not sit to issue "clarifications" of recent decisions. While the Cross-Petitioners are understandably unhappy about the result in *Renne*, certiorari is not granted to reiterate to unsuccessful parties why they did not succeed.

Second, the decision to dismiss the claims here as nonjusticiable is correct, following directly from this Court's ruling in *Renne*.

Unlike San Francisco's Petition for Certiorari, the Cross-Petition seeks review of judgments that follow directly from *Renne v. Geary*. The Cross-Petition should be denied.

DATED: June 13, 1994

Respectfully submitted,

LOUISE H. RENNE
City Attorney

DENNIS AFTERGUT
Chief Assistant City Attorney

Attorneys for Cross-Respondents

APPENDIX A

Dennis Aftergut
Chief Assistant
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(415) 554-4213

July 21, 1993

Cathy A. Catterson, Clerk
United States Court of Appeals
Ninth Circuit
121 Spear Street
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *Geary v. Renne* (No. 89-15601)
Mark v. Corwin (No. 89-15603)

Dear Ms. Catterson:

In our letter to the court of May 24, 1993 ("the May 24 Letter"), appellants Louise H. Renne, City & County of San Francisco, *et al.* ("the City"), argued that none of the appellees remaining in *Geary v. Renne*, Court of Appeal No. 89-19691, have standing as "speakers." In answer to this argument, at the June 24, 1993 hearing in this case, counsel for appellees Bob Geary, *et al.*, cited portions of the clerk's record. Counsel stated that the cited documents show that appellees Sudi Trippet and Election Action submitted ballot arguments in connection with the June 1988 municipal election in San Francisco. Therefore, he argued, Ms. Trippet and Election Action have standing in this case as speakers.

At the hearing, Judge Rymer asked me for the City's response to this argument. I answered that without looking at the documents, I could not fully respond. Having now reviewed the documents and having reviewed the

case law, I am taking the liberty of submitting this response.

The *Geary* action was filed on September 11, 1987. *See Geary Complaint*, ER (cross-appeal) 1. Its first claim for relief alleges a single, live controversy. *Id.* at 3, ¶ 13; *see also* the May 24 Letter, p. 1 n.2. That controversy involves the judicial editing of ballot arguments in connection with the *November 1987* municipal election. ER (cross-appeal) 4, ¶ 15.

The documents newly cited by appellees relate to a totally separate controversy. They support the claim that in *April 1988*, appellee Trippet submitted ballot arguments on behalf of Grassroots/Election Action in connection with the *June 1988* municipal election.[1] In contrast, the controversy in *Geary* is over ballot arguments submitted and judicially edited nine months earlier.

The law is clear that "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2141 (1992) (emphasis added in *Lujan*) (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)); *see also Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir. 1990), and *Kuntz v. Rees*, 760 F.2d 926, 930 n.4 (9th Cir. 1985), *vacated on other grounds*, 785 F.2d 1410, 1411, *cert. denied*, 479 U.S. 916 (1986).[2] Moreover, if standing does not exist when the complaint is filed, it does not

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[1] We note that Grassroots/Election Action is not a party in this case; only Ms. Trippet and Election Action are.

[2] This rule does not mean that standing cannot be *lost* by the dismissal of the only plaintiffs who had standing at the time the complaint was filed. *See Nelsen v. King County*, 895 F.2d at

matter if the controversy is of a kind capable of repetition yet evading review. *Nelsen v. King County*, 895 F.2d at 1254. That exception is limited to the doctrine of mootness. *Ibid.*

In this case, the *Geary* complaint does not set forth facts establishing that appellants Trippet or Election Action have standing as "speakers": The complaint does not allege that they ever submitted ballot arguments. ER (cross-appeal) 3-4, ¶¶ 13 and 15. And supplementation of the complaint at this point to allege such facts would not be permissible: A supplemented complaint *in 1993* alleging that appellees Trippet and Election Action submitted ballot arguments before the *June 1988* election would not set forth a live controversy, since a court could no longer grant any relief with respect to that election. *See Renne v. Geary*, 111 S.Ct 2331, 2338 (1991) and the May 24 Letter, p. 5. Thus, the supplementation could not be permitted because such a controversy would not be justiciable. *Ibid.*; *see Reddy v. Litton Industries, Inc.*, 912 F.2d 291, 296 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 332 (1991) (affirming denial of leave to amend "when any proposed amendment would be futile").

1250 (" 'The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).' " (quoting *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980)).

In sum, nothing in the record supports a claim that appellees Trippet and Election Action have standing as "speakers" in the controversy alleged in this action.

Respectfully submitted,

LOUISE H. RENNE
City Attorney

DENNIS AFTERGUT
Chief Assistant City Attorney

cc: Arlo Hale Smith
Sudi Trippet
Terence Faulkner

Supreme Court, U.S.
FILED
JUN 17 1994
OFFICE OF THE CLERK

(3)

No. 93 - 1846

In the Supreme Court

of the

United States

October Term, 1993

DENNIS MARK, *et al.*,
Cross-Petitioners,

vs.

MICHELLE CORWIN, *et al.*,
Cross-Respondents

==========

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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AMICUS CURIAE BRIEF IN SUPPORT OF
CROSS-PETITION FOR WRIT OF *CERTIORARI*

==========

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Attorney for *Amici*

Supreme Court, U.S.
FILED
JUN 17 1994
OFFICE OF THE CLERK

13 pp

TABLE OF AUTHORITIES:

Committee to Prevent Municipal Bankruptcy v. Renne (1/20/1994) __ FSup ___: 4

Eu v. Democratic Pty. Cent. Comm. (1989) 489 US 214: 10

Near v. Minnesota (1930) 283 US 697: 11

Renne v. Geary (1991) 501 US 312: *passim.*

SEIU v. FPPC (1992) 955 F2d 1312: 5

Thorsted v. Gregorie (2/10/1994) __ FSup ___: 4

Wong v. Bd. of Supervisors / Goland (4/8/1994), San Francisco Superior Ct. No. 959812: 7

Wong v. Bd. of Supervisors / Ventresca (9/3/1993), San Francisco Superior Ct. No. 9545, appeal pending: 6

AMICUS BRIEF IN FAVOR OF CROSS-PETITION FOR WRIT OF *CERTIORARI*:

Amici curiae respectfully ask that a writ of *certiorari* be issued as asked by Cross-Petitioners in ***Mark v. Corwin***.

This request is made, not only as speakers and hearers of speech, but also as citizens who want to exercise their right to petition for redress of grievances at the ballot box as fully-informed citizens who have not been deprived of the basic information of the American political system, namely the opinions of political parties, campaign committees and other electoral advocates, regarding candidates and issues.

Amici have a vital interest in this case, as contributors of ballot arguments concerning local measures, as members or officials of various political parties, as past and future candidates for non-partisan office and as voters.

What is ultimately at stake is ***the republican form of government*** which the Constitution guarantees to the people of each state. Representative government means above all that power comes from elections measuring the will of the people. This is undercut if the voters' decisions as to what endorsements or arguments are true or relevant, are made for them by government officials acting to reduce the flow of information to them by deleting from voter-pamphlets those endorsements or arguments which the officials consider false or irrelevant.

Such paternalistic censorship has the purpose and effect of making voters less aware of the disfavored opinions. If officials have *any* right to censor opinions they disapprove of, there is no limit to that right. The resulting ignorance is at least as inconsistent with a republican form of government, as monarchy ever was.

The kinds of censorship at issue in ***Mark v. Corwin*** are particularly harmful to those whose political positions are relatively less well-known or whose campaigns are relatively poorly-financed, who therefore are especially dependent on equal access to the publicly-financed voter-pamphlets where the challenged censorship occurs.

Most importantly, ***Renne v. Geary*** **(1991) 501 US 312** has created doubts as to whether *Amici* - or anyone else - even have standing to complain of this censorship.

As will be explained, lower courts are construing *Renne* in very different ways. Of four cases published or now on appeal, a district court and a 9th Circuit case apparently found voters generally have standing to challenge election-speech restrictions, while another district court and another 9th Circuit case apparently found voters generally *don't*.

The Court should take this opportunity to clarify whether *Renne* was intended to make major changes in longstanding principles of federal constitutional jurisprudence by greatly increasing plaintiffs' burden to prove redressability and by greatly reducing voters' right to claim listener standing.

Amici ask the Court to rule that *Renne* is authority for denying justiciability only where a statute's lack of history or mechanism of enforcement makes it doubtful that it ever has resulted in censorship in the past or ever is likely to do so in the future - *i.e.*, where the issue is not yet ripe.

Renne concerned §6(b) of the California Constitution, which prohibits political parties from endorsing or opposing candidates for non-partisan office, including all local offices, but which has no provisions for penalties, censorship or other enforcement mechanism.

In that case, §6(b) had been used by local officials as authority for censoring mention of party endorsements or affiliations from voter pamphlet candidate statements, which censorship could at least equally have been justified under California Elections Code §10012, challenged in *Mark*.

This combination of circumstances led the *Renne* majority to conclude that there was too little likelihood that §6(b), by itself, would result in censorship that would not occur anyway under §10012. As long as censorship attributable to §6(b) appeared to be a remote and speculative peril, and had neither the enforcement record nor enforcement mechanisms that would clarify its actual operation and effect (if any), the *Renne* majority concluded the issue was not yet ripe.

The *Renne* dissenters disagreed among themselves as to whether §6(b), as used in the particular case, was valid, but agreed that the issue of its validity, at least as used in that case, was ripe; and that the majority appeared to be inventing a new and unjustified redressability rule to the effect that an unconstitutional law cannot be challenged unless every other law that could possibly be used to the same effect, is also challenged in the same suit.

The majority gave no indication whether the dissents had accurately understood it as to its apparent creation of a new redressability principle.

The unclarity plainly results from the fact that the issue had not been litigated. At no time had the City, with its large staff of attorneys, ever thought to raise it; nor did the California Judges Association in its *amicus* brief in support of the City's position. The idea did not occur to the federal district court, nor to any judge on the original appeals court panel nor on the *en banc* court. The issue was not included in the question on which *certiorari* was granted, nor was it mentioned in either party's briefs, nor in any *amicus* brief.

When the issue was first brought up at oral hearing, the prudent way to avoid the predictable confusion would have been either to remand for a determination of redressability, or at least to have had the parties brief the issue.

At *en banc* hearing in the present case, Judge Rymer said bluntly: "In...Renne, the Supreme Court made noises which I find difficult to decipher..." (see *Mark* Cross-Petition at 4 and 8-A and *Corwin* Petition at I-24).

Though without the same frankness, the *en banc* ruling makes it apparent the rest of the 9th Circuit felt the same. That court voided §10012 without even addressing the City's *Renne*-redressability argument (the first question on which *certiorari* is asked in the *Corwin* Petition); and dismissed the challenges to §§ 10013.5, 3795 and 5025 as non-justiciable, with no explanation beyond a citation to *Renne* (an issue raised by the *Mark* Cross-Petition).

At the *en banc* hearing, as may be seen in the transcript reprinted with the Cross-Petition especially at 11-A, there were doubts whether the City's voter-pamphlet censorship continued to be an issue. As will be explained in the last part of this brief, *Amici* continue to be injured by voter-pamphlet deletions and threats of deletions.

Amici are associated in various ways with several ballot-qualified parties as well as campaigns for or against various ballot propositions. Since the *en banc* ruling, one was victim of a partly-successful censorship effort by Petitioners under the statutes at issue; another was victim of an unsuccessful attempt by them. Others are kept from campaigning for local office under their movement's chosen banner.

In addition, all the *amici* are denied equal access to a forum they are forced as taxpayers to subsidize. And all, as voters and readers, are denied the right to decide for themselves which claims and arguments to consider false, misleading, irrelevant or otherwise to be disregarded.

LOWER COURTS IN DISARRAY ON CONSTRUING *RENNE*

Renne has resulted in confusion among district courts and appellate panels within the 9th Circuit, as to what plaintiffs must show, to have standing for federal challenges to local laws abridging electoral-speech freedom.

Must an enforcement attempt be pending when the suit is filed? Is it enough if a law was enforced in the recent past? Or if an enforcement mechanism exists which authorities say they intend to use if plaintiffs violate the provision?

Do plaintiffs have to be subjected to civil or criminal proceedings before having standing to challenge a censorship law? If so, does a plaintiff gain standing if a proceeding is initiated against her while the suit is pending?

Do laws first have to be construed by state courts before federal courts can consider constitutionality challenges? Or is it enough if plaintiffs allege their desire to exercise their electoral speech or press rights in ways the challenged law now prohibits?

In four cases citing *Renne*, different judges or panels of judges have answered these questions differently.

In ***Thorsted v. Gregorie*** (W.D. WA 1994, __ F.Supp. __, No. C92-1763 WD, decided February 10, 1994, appeal pending), Judge William Dwyer allowed individual voters and an association of voters asserting a right to decide what candidates to support, to challenge a Washington State law imposing term limits on Congressional candidates, although the law had never been construed by the state courts, and will only take effect with the 1994 election. Judge Dwyer distinguished *Renne* as a case in which **"further opportunity for the state courts to interpret the statute might alter the question presented."**

In ***Committee to Prevent Municipal Bankruptcy v. Renne*** (N.D. Cal. 1994, No. C92-3689 CAL, decided January 20. 1994, appeal pending), Judge Legge reached exactly the opposite conclusion. In a suit challenging San Francisco

provisions imposing a combined $500 limit on contributions to a candidate directly and through independent committees, the court found lack of standing even though the ordinance in question had actually been violated by the plaintiffs during the 1992 election campaign. Judge Legge expressly relied on *Renne* to reach this conclusion.

In *SEIU v. FPPC* (1992) 955 F.2d 1312, a panel of the 9th Circuit rejected a *Renne*-based attack on the plaintiffs' standing, even though the state campaign contribution limits under challenge had not yet been enforced and had never been construed by the state courts.

In the instant case, a 9th Circuit *en banc* panel went to the opposite extreme. Although the challenged censorship statutes had repeatedly been enforced in the state courts and had been presented to the state appellate courts to construe (and given *no* narrowing construction), the court found a lack of a justiciable controversy as to three of the statutes, citing *Renne* as its sole authority, and giving no explanation (even as to why this didn't also apply to the other statute).

Which of these decisions are wrong? Which are right?

This needs to be answered, not only to clarify the prerequisites for standing to litigate the 1st-Amendment rights at issue, but also for the bottom line: to make it possible to stop use of the disputed statutes to abridge those rights.

THE STATUTES ABRIDGE *AMICI'S* POLITICAL RIGHTS

In a variety of ways, the four challenged statutes impose prior restraints abridging freedom of electoral press in a vital forum, thereby infringing *Amici*'s individual and associational political rights in various ways, sometimes severely.

Certiorari should be granted not only to clarify whether *Renne* greatly altered redressability or standing criteria, but also to allow review of the *en banc* dismissal of Cross-Petitioners' challenges to the statutes allowing judicial censorship of voter pamphlet statements if a judge is convinced the statement is false, misleading, irrelevant or otherwise inappropriate, even in the absence of any claim of intentional dishonesty or disregard for facts or relevancy.

As it stands, both the District Court ruling that these statutes are void, and the initial Appeals Court ruling that

they are valid, have disappeared into thin air, several years of litigation having ended in an unexplained dismissal based on lack of justiciability under *Renne*.

Renne was clearly based on lack of ripeness where it is doubtful what if any effect a provision has or whether it ever has been or is likely to be used to block any communication that wouldn't be blocked anyway.

Here there were all degrees of ripeness. There had been numerous censorship proceedings under specific authority of these statutes in recent years, including some decided shortly before the suit was filed, some pending when it was filed and some initiated shortly after it was filed, while it was pending in the District Court.

In addition, here a clear enforcement mechanism exists and Petitioners have stated their intent to continue using it, and have done just that. If these do not make a justiciable controversy, it is not clear what would.

Any theory that the issue might be moot is refuted by Petitioners' using the statutes immediately after the *en banc* decision, in a partly-successful effort to censor a statement by *amicus* Ventresca concerning a local ballot measure, in ***Wong v. Bd. of Supervisors (Ventresca)*** San Francisco Superior Court No. 9545, decided September 3, 1993 (appeal pending), in which Registrar Wong (successor to Petitioner Corwin), under Petitioner Renne's direction, sought deletion of over 90% of a 249-word ballot-argument largely consisting of criticism of the current Mayor.

The court denied almost all the deletions sought but did order changes to one sentence. This constitutes "abridging" the freedom of press that used to exist; when the First Amendment was enacted (and still when the Fourteenth was enacted, ultimately making the First binding on Petitioners), there was no way a judge could order changes in or even consider censoring any kind of publication criticizing public officials, on grounds that the opinions expressed were false, misleading, irrelevant or anything else.

Even in cases of libel or intentional fraud, courts could not issue injunctions or otherwise act to prevent publication of the criticism. Such was "prior restraint", the essence of the problem that had existed under the monarchy and the main evil intended to be prevented by the First Amendment guarantee of freedom of press.

Rather, civil or criminal proceedings could only occur *after* publication, when there would be adequate time to litigate such questions as fraud or defamation damages.

Even then, there was absolutely nothing courts could do against publication of *honest* criticism of public officials even if a judge found clear and convincing proof that the opinion or argument was false, misleading or irrelevant.

If the First Amendment now allows a judge to alter or delete one sentence in a criticism of the Mayor, it also allows him to do it to two sentences, or to all.

And if it allows it based on what one judge considers clear and convincing proof, then it allows it based on what another would *not* consider clear or convincing.

Even more recently, *amicus* Goland was victim of another censorship proceeding under these statutes. In ***Wong v. Bd. of Supervisors (Goland)***, San Francisco Superior Court No. 959812, decided April 8, 1994, Petitioners tried to get an entire ballot-argument deleted on the theory that its humor was off-color and therefore offensive, though no claim was or could be made that it was anywhere near obscene.

The court denied this request in entirety, but not before *amicus* Goland had been forced to obtain counsel to defend his right to equal access to the city voter-pamphlet.

Even though no deletions occurred, "censorship" did, in that the judge sat as censor, inspecting a political statement before publication to decide whether to let it be published.

While judicial approval is now required for any deletions, the First Amendment was not intended merely to require that political censorship be done only by judges.

One obvious problem is that in many cases censorship victims will prevail only on appeal, normally after the relevant election is over.

But even if the clear-and-convincing-proof standard made judges infallible, the Constitution protects false opinions as well as true ones. It also protects the voters' right to receive uncensored speech and press, so they can decide for themselves which claims and arguments to credit and which to reject as false or otherwise invalid.

Each censorship incident has involved a disagreement between a candidate or ballot-argument author, and the state Legislature and/or City officials, as to what is true, relevant or otherwise desirable for assisting voter decisions.

The most common specific issue has been the relevancy of a candidate's endorsement or other party affiliation, when the office sought is technically non-partisan.

For those who strongly identify with some party or some principle associated with one, this information is relevant even as to local offices, where candidates officially run as individuals rather than as party nominees.

Especially in the case of minor offices, candidates' names may not be well-known, and official endorsement or other partisan association may be the main if not only basis a voter has for deciding who to support (or oppose).

Also, *all* taxpayers subsidize the voter pamphlet. It is unequal if *some* are excluded from it based on their views or comments seeming false or otherwise inappropriate to some official, whether judge or otherwise (especially since taxpayers whose views are excluded still must subsidize publication of their opponents' views).

But this is especially harmful to candidates and ballot-measure supporters and opponents who are relatively less well-known or well-financed, and who therefore have less access to other publicity. One of the main purposes of voter pamphlets is to give the voters full access to all views, including of those who, through lack of fame or fortune, have less access to other mass media.

This is all the more harmful to dissenters, since minority opinions not only have less access to the mass media almost by definition, but also because they are the opinions that a judge would be most likely to conclude have been proved false or otherwise unworthy.

As party members, candidates and officials, *Amici*'s right to associate to petition for redress of grievances is abridged by actual and threatened deletions of party references from voter-pamphlet candidate statements.

Such deletions are the greatest burden to smaller and newer parties, the parties that can least bear it.

For instance, *Amici* Christman and Traynor's Green Party is California's newest ballot-qualified party and has not yet been able to elect its candidates. Much of the problem is the winner-take-all election system; many Green Party candidates have been elected in countries with proportional representation, which gives minorities the representation they don't get in most elections in the USA.

But a major added problem is the fact that parties can only nominate and run candidates for the relatively-major statewide offices. California state Senatorial districts are larger than Congressional districts; two Assembly districts have more people than the entire state of Wyoming.

The Green Party is experiencing the same problem the state's older Peace-&-Freedom and Libertarian parties have, in needing to start with the smallest, local offices, especially city councils, school boards and similar offices where more than one candidate is elected and it is possible to finish as low as fifth or sixth, and still win office.

Technically, it is literally impossible for California parties to campaign for such non-partisan offices. A number of members of *Amici* Evans and Feinland's Peace-&-Freedom Party have been elected to local offices, but since they have been elected as individuals and not as party nominees, their party hasn't reaped the credibility their successes merited.

Amici O'Brien and Valverde's Libertarian Party has had the identical problem. While other parties' candidates more often run on their personal record or on specific platforms, Libertarian campaigns generally focus on the single principle which gives their party its name; to deny them the right to identify their party is in effect to deny them the right to identify their viewpoint.

Concern about §6(b) and the censorship statutes at issue here, contributed to the party's decision to sponsor a local voter initiative in 1991, adopted by a 73% majority, declaring a San Francisco policy of opposition to censorship in the city voter-pamphlet and everywhere else.

It is, of course, possible for a local party organization to rally behind a candidate for non-partisan office. Although §6(b) of the state constitution forbids it, party committees sometimes make official endorsements for such offices, and have not been prosecuted for doing so.

But in the voter pamphlet, usually the most important forum of the campaign, mentions of party endorsement or partisan affiliation in candidate-statements are routinely censored by combined authority of §§ 6(b) and 10013.5, thus denying the voters' right to know what many consider the best reason to support or oppose a candidate.

The disadvantage can affect even large parties, such as *Amicus* Lee's Republican Party, a minority in San Francisco.

This led Cross-Petitioner Mark and three other leaders of the San Francisco Republican Party to join with Democratic Party leaders and others in filing the present suit.

Incumbents have great fund-raising and name-recognition advantages. Since few San Francisco Republicans have been elected in recent years, local incumbency advantages usually go to Democrats, whose supporters usually know who they are and what they stand for. Voters who might want to support another party or to split their ballots, often don't know the non-incumbent candidates or what they represent, partly because §10013.5 allows party affiliation to be deleted from the statements of candidates who consider it relevant.

Even members of *majority* parties are aggrieved by loss of the right to associate for political speech as a result of §6(b)'s ban on party endorsements for non-partisan office and §10013.5's authority for deleting such endorsements from candidate statements.

Not all majority-party candidates are well-known or well-funded. For San Francisco Democrats who are not well known, it would help to be able to cite the party's endorsement, and it is vital to at least mention party membership to the voters, most of whom usually don't vote for candidates they don't recognize to be Democrats.

And even incumbents and other top leaders of majority parties are also aggrieved by laws barring (or allowing censorship of) endorsements by their parties.

Party leaders devote themselves to party activism because they see support for a group with similar concerns as the best way to achieve their objectives. To prevent parties from speaking on some subjects is to abridge the rights of their leaders and members to speak collectively and associate peacefully to petition for redress of grievances.

This led San Francisco Democratic Party leader Geary, the Respondent in *Renne*, to join with others in filing the original challenge to §6(b).

It also led *Amici* Davis and Riordan's Democratic Party itself to file the successful challenge to a ban on parties endorsing in their own primaries, affirmed in ***Eu v. Democratic Party Central Committee*** (1989) 489 US 214.

In that case, the party was at least as much interested in their right to collectively *oppose* (LaRouche-backed) candidates as to *support* candidates.

Most importantly, *Amici* and other voters are missing information they want, and generally have no way to even know what they're missing. The voters' right to listener-standing may be the most urgent issue of the case.

CONCLUSION:

In 200 years, the Supreme Court has never approved prior restraint on publication of political opinions or claims on the basis that they were false or otherwise likely to be more persuasive than they deserved to be. See, *e.g.*, ***Near v. Minnesota*** (1930) 283 US 697.

Even as to libel or fraud, the First Amendment traditionally is taken only to allow *subsequent* sanctions, not court orders to prevent the initial publication.

Even subsequent sanctions on political libel or fraud can only be imposed after the accused has a right to a jury trial (and ordinarily to an appeal prior to imposition of penalty); and the accused must be shown to have made false statements that defamed or defrauded someone; and to have knowingly and intentionally disregarded the truth.

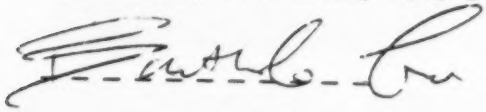
The fact that City voter pamphlets are subsidized by City taxpayers does not support the City's right to censor statements by those taxpayers; rather, it supports their right to uncensored access, equal with other taxpayers.

Nothing in *Renne* suggests that officials can now censor honest political debate based on the merits of the views or of the arguments supporting them.

But that decision, at least as construed by the *en banc* court in this case, has made it unclear under what conditions anyone still has a right to challenge such censorship.

For these reasons, *Amici* ask the Court to grant *Certiorari* on the Question proposed by Cross-Petitioners; and to clarify *Renne* regarding redressability and standing criteria.

Respectfully submitted, June 17, 1994.



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